JD–98–17
Niagara Falls, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91 (SCRUFARI CONSTRUCTION CO. INC.),

and **Cases 03–CB–196682**
03–CB–201412

RONALD J. MANTELL, an Individual.

Counsel:

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of Buffalo, New York, for the General Counsel

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DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. In a recent case the National Labor Relations Board (Board) found that a local union that operated a nonexclusive hiring hall unlawfully discriminated against a union member by removing him from the union's out-of-work referral list in retaliation for his criticism of the local union's business manager. Here, the same local union is alleged to have committed a series of violations of the National Labor Relations Act (Act) directed towards the brother of the discriminatee in the earlier case.

As discussed herein, I find that in these cases the government's allegation that a local union member was unlawfully denied referrals from the local union's hiring hall because of his relationship with his brother is unproven under the appropriate legal standards. I also find that, even assuming the truth of the allegation that he was subject to internal union discipline because of his brother's protected activity, in this case the union's discipline was not prohibited by the Act. I do find, as alleged, that on one occasion the union member was unlawfully threatened with retaliation if he contacted the Board, and on another that he was unlawfully denied an opportunity to review the out-of-work referral list for discriminatory reasons. Finally, I find that the local union's change to weekly posting of the out-of-work list did not violate the Act.

STATEMENT OF THE CASE

On April 12, 2017, Ronald J. Mantell (Mantell) filed an filed an unfair labor practice charge alleging violations of the Act by Laborers International Union of North America, Local Union No. 91 (the Local or Local 91 or Union), docketed by Region 3 of the Board as Case 03–CB–196682. A first amended charge was filed in the case on April 24, 2017. Based on an investigation into this charge, on June 29, 2017, the Board's General Counsel, by the Regional Director for Region 3 of the Board, issued a complaint and notice of hearing in this case. Local 91 filed an answer denying all violations on July 13, 2017.

On June 27, 2017, Mantell filed an additional charge against Local 91, docketed by Region 3 of the Board as Case 03–CB–201412. On August 23, 2017, the Board's General Counsel, by the Regional Director for Region 3, issued an order consolidating Cases 03–CB–196682 and 03–CB–201412, and a consolidated complaint and notice of hearing. Local 91 filed answer to the consolidated complaint on September 6, 2017, denying all violations alleged. The General Counsel issued an amendment to the consolidated complaint on September 25, 2017. Local 91 filed an answer to the amended consolidated complaint on October 9, 2017.[1]

A trial in these cases was conducted on October 11 and 12, 2017, in Buffalo, New York.[2] Counsel for the General Counsel and counsel for the Respondent filed post trial briefs in support of their positions on November 30, 2017.

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

It is admitted (GC Exh. 1(r)) and I find that at all material times, Scrufari Construction Co. Inc. (Scrufari) has been a corporation with an office and place of business in Niagara Falls, New York, and has been a general contractor in the construction industry doing commercial construction. It is admitted (GC Exh. 1(r)) and I find that at all material times, the Council of Utility Contractors, Inc., the Independent Builders of Niagara County, the Associated General Contractors of America, New York State Chapter, Inc., and the Building Industry Employer's

[1] I note that in its answers, the Respondent denied knowledge and information sufficient to form belief as to the truth of the allegations of the complaint relating to the filing and service of the various charges and amended charges in these cases. However, there was no objection to the offer into evidence of the formal papers, including the charges, thus conceding, I find, the authenticity of the charges. Their service is supported by affidavits of service (See, GC Exh. 1(b), (c), and (f)) included in the formal papers, and I find that in the absence of any contrary evidence, the rebuttable presumption of service provided by these affidavits constitute "sufficient proof" to establish service pursuant to Sec. 102.4(d) of the Board's Rules and Regulations. See, *CCY New Worktech, Inc.*, 329 NLRB 194, 194 (1999); *Sears Roebuck and Co.*, 117 NLRB 522 fn. 3 (1957). There is no evidence suggesting that they were not served. There is no hint of any basis in the record for the Respondent's repeated denials of the various complaint allegations regarding the filing and service of the charges.

[2] At the outset of the trial, counsel for the General Counsel offered an unopposed oral motion to further amend the consolidated complaint, rephrasing, par. 5. The motion was granted and in wake of the motion the counsel for the Respondent represented that para. 5 of the complaint was admitted.

Association of Niagara County New York, Inc., collectively referred to as the Associations, have been organizations composed of various employers, including Scrufari, engaged in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Local 91. It is admitted (GC Exh. 1(r)) and I find that annually, the employer-members of each of the Associations, in the course of their business operations described above, collectively, purchase and receive goods valued in excess of $50,000 directly from points outside the States wherein the employer-members are located. Based on the above, I find that at all material times Scrufari and the employer-members of the Associations have been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is admitted and I find that at all material Local 91 has been a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

A. The refusal to refer

Local 91 is located in Niagara Falls, New York, and is composed of approximately 240 members. It operates a nonexclusive hiring hall from its offices. As a nonexclusive hiring hall, the Local refers members for work, but members are free to and do obtain work directly from signatory contractor-employers without going through the hiring hall.

The Local maintains an out-of-work list that members sign up for and which is used in referrals. Although the rules are too extensive to summarize here (see R. Exh. 1), members who sign up for the out-of-work list are listed in order of date signed up. While members are often sent out in the order they signed up for the list, there are numerous and significant exceptions that limit this. For instance, employers may ask for specific employees by name and they will be sent out without regard to their place on the list. The business manager has discretion to name a steward for every job, without following the order on the list. Employees requiring additional hours to qualify for unemployment or other fund eligibility are referred above other applicants, without regard to their place on the list. Requests for foremen are filled by the business manager without regard to the list. In addition, of course, each job for which employers seek employees requires certain certifications or qualifications that the employee must have demonstrated in order to be referred to that job. Employees are required to re-register for the out-of-work list within 90 days in order to maintain their position on the list. Employees finding work on their own of one or more jobs that in the aggregate last five working days or more must advise the Local and are then removed from the out-of-work list.

The Union's business manager, Richard Palladino, is the primary person who determines which members get referred. The Local's part-time jobs dispatcher, Mario Neri, has primary responsibility for maintaining the out-of-work list.

In a recent decision[3], the Board found that the Local unlawfully removed a member, Frank Mantell, from its out-of-work list referral list from October 12, 2015 until November 19, 2015, in retaliation for his Facebook postings critical of the Local's business agent, Palladino. Mantell made his critical posts in August 2015. As found by the Board, Palladino filed internal union charges against Frank Mantell in early September 2015. A union trial board conducted a trial and

[3] *Laborers' International Union of North America Local Union No. 91 (Council of Utility Contractors, Inc.)*, 365 NLRB No. 28 (2017).

found Mantell guilty on October 5, a decision ratified at the Local's monthly membership meeting on October 12. Mantell was removed from the out-of-work referral list the next day. He appealed to the International Union and the International Union apprised the Local of the appeal on November 19, which stayed any penalty assessed against Mantell. On December 4, 2015, the International Union informed the Local that it dismissed the charges against Mantell.

Frank Mantell's brother, Ronald Mantell (hereinafter Mantell), is a 27-year member of the Local Union. Mantell testified that over the years he has regularly gotten work through the hiring hall. Mantell testified that he was last referred out in November 2015 for a job that lasted three to four weeks. He then signed back up for the out-of-work list and was not, thereafter, referred from the out-of work list. The Respondent's witnesses appear to acknowledge this, and it seems to be supported based on the documentary evidence placed into the record. Thus, General Counsel's Exhibit 16—entered into evidence during the cross-examination of the Local Union's dispatcher Neri—shows that between January 1, 2015 and October 10, 2017, Mantell's last referral from the Local was on November 4, 2015.[4] According to this document, there were no more referrals of Mantell in 2016 or 2017 (through October 1, 2017, the ending point for the document).

Previously in 2015, Mantell had worked steadily. (GC Exh. 3.) Indeed, his annual pension crediting (GC Exh. 2), which shows hours worked by fiscal year (ending each May 31 of the year) shows that Mantel worked more hours in fiscal 2015 (i.e., through May 31) than he had in any year since 2009. He worked steadily in fiscal year 2016 (i.e., from June 1, 2015 forward) through November 2015. However, after that, he only worked one 7-hour job in early 2016.[5]

It is notable that no testimony and neither of these documents (GC Exhs. 2 & 3) distinguish between work Mantell may have obtained directly through a signatory employer, and work for which he was sent out from the Union's out-of-work list. Moreover, General Counsel's Exhibit 16, the document showing referrals in 2015–2017, does not show how many hours resulted from each referral or whether those referrals were the result of employer calls for specific employees, or what qualifications or certifications were required for any of these jobs. The document merely shows that Mantell was sent out on certain jobs with a certain employer, starting on a certain date. Indeed, the dates of referral listed on General Counsel Exhibit 16 for Mantell do not, or in some cases only loosely, match the dates he began work at a job as shown in in General Counsel Exhibit 2. This makes it impossible to conclude, even for the one year—Fiscal 2016—for which the record contains documentation from which such comparison can be attempted, how many of Mantell's 741 hours in Fiscal 2016 resulted directly or indirectly from referrals. Even as to the referrals, there is no evidence as to whether these jobs were filled by Mantell (or others)

[4]Unexplained is why Mantel's work history documentation (GC Exh. 3) shows no work for Scrufari in November until November 30, for a job that lasted until December 18. Whether or not this is the same job for which he was referred, with a start of date of November 4, is not explained in the record.

[5]Thus, the record evidence leaves us with the following, very incomplete, information. Mantell's work resulting in pension credit, which would include work for signatory contractors obtained directly by himself and through the local union, amounted to a total of:

585.50 hours in fiscal year 2011 (through May 31, 2011)
1090.5 hours in fiscal year 2012 (through May 31, 2012)
738.25 hours in fiscal year 2013 (through May 31, 2013)
755 hours in fiscal year 2014 (through May 31, 2014)
1121 hours in fiscal year 2015 (through May 31, 2015)
741.25 hours in fiscal year 2016 (through May 31, 2016).

based on their position on the out-of-work list, or based on employer preference for certain employees, stewardship, or other basis. We do not even know the dates or place that Mantell was on the out-of-work list during the nearly two-year period in question, with the exception of an out-of-work list in evidence from one day, June 21, 2017, that showed Mantell listed seventh for that date.

Analysis

The General Counsel alleges that Local 91 violated Section 8(b)(1)(A) of the Act by refusing, since November 2015, to refer Mantell for work from the Local's out-of-work referral list in retaliation for the protected and concerted activity of his brother.

While the Local does not owe employees a duty of fair representation with regard to referrals from a nonexclusive hiring hall,[6] it is a violation of Section 8(b)(1)(A) to refuse to refer members for employment in retaliation for protected and concerted activity. *Laborers Local 91*, 365 NLRB No. 28, slip op. at 1 (2017). The Board finds that the loss of referrals "deprive[s] [the charging party] of employment opportunities" and thereby affects employment in violation of Section 8(b)(1)(A). *Laborers Local 91*, supra at slip op. 1.

Analysis of an 8(b)(1)(A) allegation of this type is analogous to analysis of an 8(a)(3) discrimination claim against an employer, and thus, in assessing motivation-based 8(b)(1)(A) discrimination cases, the Board uses the analysis for assessing employer discrimination established by the Board in *Wright Line*, 251 NLRB 1083 (1980). *Plasters Local 121*, 264 NLRB 192 (1982); *Electrical Workers Local 429*, 347 NLRB 513, 515 (2006), remanded on other grounds 514 F.3d 646 (6th Cir. 2008).

Under the Board's decision in *Wright Line*, the General Counsel bears the initial burden of showing that a respondent's decision to take adverse action against an employee was motivated, at least in part, by animus against protected activity. Such showing proves a violation of the Act subject to the following affirmative defense: the respondent, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by demonstrating by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Willamette Industries*, 341 NLRB 560, 563 (2004).

In this instance, the outcome of this allegation turns on the manner in which the *Wright Line* analysis is applied. Specifically, the issue turns on the question of whether the General Counsel successfully met his initial burden under *Wright Line* sufficient to prove unlawful motivation on the part of the Respondent and shift the burden to the Respondent to prove that it would have taken the same action in the absence of Mantell's brother's protected activity.

The centrality of the assignment of burdens of proof arises because the parties in this case chose not to develop a record that would shed light on the appropriateness or inappropriateness of any referral for Mantell to any specific job or in any specific instance. There is no record evidence as to which jobs the Local discriminatorily failed to send Mantell. There is no evidence of any particular job to which it can be said that the Local violated its rules (discriminatorily or otherwise) in not referring Mantell to this job. Based on the record evidence, we do not know the qualifications, employer requests, or rationale of those chosen for any of the

[6] *Carpenters, Local 370 (Eastern Contractors Ass'n)*, 332 NLRB 174, 174–175 (2000). Because the hiring hall is nonexclusive, the union's failure to refer does not prevent an employee from being hired.

referrals taking place during the nearly two-year time period in which the Local is alleged to have discriminated against Mantell. We do not know Mantell's record of re-registering for the list, or when he was or was not on the list or what place he was on the list. Indeed, an out-of-work list is in evidence for only one day's job referral, a list dated June 21, 2017, used for referrals to a job on June 26, 2017, and there is no evidence as to the type of job or circumstances surrounding the employer's call for labor, and no direct evidence of the basis for the referrals made.

In his brief, the General Counsel asserts that it is the Respondent's burden and obligation to fill out this hole in the record. The General Counsel asserts that it has met its initial burden to prove that there was a discriminatory motive for Mantell's failure to obtain these referrals. Thus, the General Counsel relies on the (already-proven) animus towards Mantell's brother and the fact that referrals evaporated for Mantell after November 2015, to contend that he has proved that the Respondent's failure to refer Mantell for a nearly two year period was discriminatorily motivated. According to the General Counsel, the burden shifts to the Respondent to show that the referrals occurring during the violation period would have been made even in the absence of Mantell's (brother's) protected activity. Thus, according to the General Counsel, the absence of record evidence about the referrals—whether or not Mantell was qualified, whether or not an employer asked for other employees, whether or not others were ahead of Mantell on the out-of-work list, or even if or where Mantell was on the out-of-work list for a particular referral—this is all the Respondent's problem.

The Respondent, on the other hand argues that the lack of evidence about the referrals shows that the General Counsel has failed to meet his initial burden. The Respondent argues that the General Counsel has not shown a single specific job referral in which there has been discriminatory treatment, or in which the Union's rules were not followed.[7]

I believe that the Respondent has identified a significant problem with the General Counsel's approach in this instance. The General Counsel is relying on an application of the *Wright Line* framework used in cases where an employer has discharged or disciplined an incumbent employee. In that scenario, the elements required for the General Counsel to show that protected activity was a motivating factor in an employer's adverse action are summarized as a three-prong test of protected activity, employer knowledge of that activity, and animus on the part of the employer. *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015).

Under the three-prong discharge/discipline *Wright Line* framework, the General Counsel would likely be able to satisfy its initial burden of proof and shift the burden to the Respondent to prove that it would have taken the same referral actions in the absence of protected activity. Thus, even cursory review of the Board's findings in *Laborers Union Local 91*, 365 NLRB No. 28

[7]As counsel for the Respondent argued at the hearing:

> The Board hasn't proved that he was entitled to a referral and was not referred out on any given day. And so they have to prove that he didn't get a referral and he should've gotten a referral on a particular date within the 10(b) statute. They haven't proved that at all. No proof whatsoever of that. All they've got is a witness saying, I haven't been referred. But they haven't proved that he should have been referred. That he was eligible for referral. And that the referral was a violation of a policy or a procedure or motivated by some protected activity; by either the brother's Facebook or by—in fact, by the brother's Facebook. So they haven't demonstrated that at all. What referral did he not get was in the 10(b) time period?

(2017) demonstrates that Mantell's brother (Frank Mantell) engaged in protected activity and that the Respondent was aware of it. This is all undeniable, as a matter of collateral estoppel. *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1024–1025 fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992). The Board also found in that case that there was unlawful animus towards Frank Mantell, which the Respondent acted upon illegally. That unlawful retaliation would support the inference that Mantell's failure to be referred was motivated by additional retaliation for his brother's protected and concerted activity.[8] Most significantly, especially combined with the demonstrated animus towards Frank Mantell's protected activity, the abrupt cessation of referrals for Ron Mantell after November 2015, supports this conclusion. This was the same month in which Frank Mantell filed his NLRB charges. The Board has long recognized that in discrimination cases unexplained timing can be indicative of animus. *Electronic Data Systems*, 305 NLRB 219, 220 (1991), enfd. in relevant part 985 F.2d 801 (5th Cir. 1993); *North Carolina Prisoner Legal Services*, 351 NLRB 464, 468 (2007), citing *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004).[9]

However, and notwithstanding the foregoing, I do not believe that a union failure-to-refer case such as this one is properly analogized to a discharge or disciplinary case. Rather, the most apt analogy is to a *Wright Line*-based refusal-to-hire case. See *FES (A Division of Thermo Power)*, 331 NLRB 9 (2000). Such cases incorporate standards into the General Counsel's *Wright Line* burden that recognize—in contrast to a discharge or discipline case—that the inferred linkage between animus and the refusal to hire is tenuous absent evidence that the potential employee was within the set of feasible applicants for the job he was denied. Thus, in a refusal-to-hire case, "the General Counsel must, under the allocation of burdens set forth in *Wright Line*,"

> first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

FES, 331 NLRB at 12 (footnote omitted).

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[8]The Board has held that retaliation against an employee person in order to retaliate against his relative who was a union activist is unlawful. *Tasty Baking Co.*, 330 NLRB 560 (2000); *American Ambulette Corp.*, 312 NLRB 1166, 1169–1170 (1993); *Thorgren Tool & Molding*, 312 NLRB 628, 631 (1993); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-1089 (7th Cir. 1987) ("to retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations") (citing cases), enfg. *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986).

[9]Finally, the General Counsel relies on the testimony of former Business Agent Robert Connelly, who testified that during a membership meeting in the Spring of 2017, Palladino warned members that "anyone going to the NLRB . . . has got another thing coming," "we're coming back after you," and "you better think twice about going to the NLRB before you bring us up on charges." Palladino denied that he made those statements. Given my resolution of the case, I do not resolve that credibility dispute.

This is relevant in the instant case as well. Here, the General Counsel argues that without any evidence of what work was needed or what happened in any specific referral, or even where or if Mantell was on the referral list, the *Wright Line* burden has been met, discrimination has been proven as a contributing factor to nearly two-years of nonreferrals, and the burden has shifted to the Respondent to prove that for each referral it made during this extended period Mantel did not have the skills, qualifications, certifications, or otherwise would not have been referred even in the absence of (his brother's) protected activity.

By relying on the discipline/discharge standard, the General Counsel can contend that he has adequately proven that discrimination caused Mantell to not get referrals, perhaps every referral that the Local made during this extended period, an unrealistic presumption that is not in accord with the goals of *Wright Line* when we know so little about the referrals that were made. Indeed, this is precisely the analogous unfairness that the Board reacted to and guarded against in *FES*, when it defined the use of *Wright Line* in hiring discrimination cases against employers to include in the General Counsel's initial burden of proof the showing not only of discriminatory motive, but that the discriminatee possessed "experience or training relevant to the announced or generally known requirement of the positions for hire." 331 NLRB at 12. What is due the employer in a refusal-to-hire case is certainly due the union in the refusal-to-refer case.[10]

A further complication in this matter is added by the statute of limitations defense raised by the Respondent. The General Counsel alleges that the discriminatory refusal to refer began after Mantell's last referral in November 2015 and continued thereafter. The charge was filed in April 2017. The General Counsel concedes (Tr. 192) that the 10(b) period and any violation found would begin October 2016. While I do agree with the General Counsel that each discriminatory failure to refer is a new violation—and hence, I disagree with the Respondent's argument at trial that under the General Counsel's theory the entire alleged violation is time-barred—the 10(b) issue adds to the uncertainty surrounding the General Counsel's generalized every-referral-is-a-presumptively-discriminatory referral theory. Thus, the General Counsel's claim is that long after Mantell's brother engaged in his protected activity—nearly one year after he filed his charge and 11 months after the Local allegedly began discriminating against Mantell—all of the referrals from October 2016 forward—of which we know almost nothing—have been shown to have continued to be discriminatorily denied to Mantell. It could be true, but we do not know enough to conclude that it more than likely is. It is unproven.

Thus, in order to meet its initial burden, the General Counsel must show more than merely that referrals were made and Mantell did not get called for them. The burden must be on the General Counsel to demonstrate, at least, that an inference of discrimination is warranted because under an application of non-discriminatory rules Mantell would have or should have been chosen for the referrals. The General Counsel must show, at least with a representative sample of referrals during the period it alleges that Mantell was not referred out for discriminatory reasons, that Mantell had the qualifications for the work, that he was on the out-of-work list, and that the employees chosen for the work instead of Mantell were chosen although Mantell was entitled to be chosen under the Local referral rules. The General Counsel has not demonstrated this to be the case in even one instance.

[10] I note that the General Counsel also analogizes this case to a refusal-to-hire case. Thus, in contesting the Union's 10(b) defense (GC Br. at 26), the General Counsel relies (solely) on a refusal-to-hire case (*La-Z-Boy Tennessee*, 233 NLRB 1255, 1255 fn. 1, 1257–1258 (1977)) as the basis to argue that the instant refusal-to-refer violation, which arguably arose 17 months before a charge was filed, is a continuing violation, and thus, not entirely time-barred.

Under a refusal-to-hire *Wright Line* standard, the case here fails. Much like in *Allstate Power VAC*, *Inc.*, 354 NLRB 980 (2009), an employer refusal-to-hire case where the record did not establish when or on what basis employees other than the discriminatees were hired, "[t]here is simply too much left unproved to find that the General Counsel has established that, at the time in question, the Respondent was hiring for a field technician position for which the seven overt salts may have had the necessary experience or training." Id. at 981. The Board concluded: "In these circumstances, we find that the General Counsel has failed to meet his initial burden under FES." Id.

I think the same must be concluded here. I recognize that it is suspicious that Mantell stopped receiving referrals after November 2015. Yet we know little—nothing really—about how many referred jobs one could reasonably expect for him to have received in 2016 and 2017 because we know nothing about the jobs, length of employment, qualifications, foremen jobs, steward jobs, adherence to sign-in procedures, requests by employers for particular employees, other employees, or much else. Basically, the nub of the General Counsel's case comes down to the fact that beginning during a time of proven animus towards Mantell's brother, Mantell was among the 15 employees referred out repeatedly in 2015, but he was not referred out in 2016 or 2017. We know that a total of only 13 different employees were referred out during—on some basis—by the Local in 2016. See GC Exh. 16. We know that a total of 14 different employees—were referred out—on some basis—in 2017 (through October 1). This compares with 15 different employees (including Mantell) who were referred out—on some basis—in 2015. See GC Exh. 16. For each of these years, we do not know how many of these were referred out in order from the out-of-work list, how many were stewards, how many were requested by the employers, or what type of work was at issue. These are not compelling numbers in a local union of 240 members where 150-160 members go to work on their own, and never rely on the out-of work list.

Given the vagaries and uncertainties of the referral system, I conclude that that the evidence is inadequate to satisfy the General Counsel's *Wright Line* burden if, as I believe appropriate, a refusal-to-hire *Wright Line* analysis is utilized. As in *Allstate Power VAC, Inc.*, "[t]here is simply too much left unproved." I recognize, as with any case in which the alleged violation is unproven, rather than disproven, there is the risk of the culpable being let go without sanction. This is a necessary byproduct of the rule of law. In my view that risk must be countenanced based on the record evidence here. I recommend dismissal of the refusal-to-refer allegations.

B. The threat to file internal union charges if Mantell contacted the NLRB

Mantell testified to a conversation he had with Palladino at the union hall in early November 2016. Mantell went to the hall and learned from the secretary that he needed to work with a union contractor again in order to be eligible for supplemental unemployment benefits through the labor agreement. Mantell then went and spoke to Palladino. Mantell complained to Palladino that he had not received a call for work all year and that "I needed work. I wasn't even eligible to get sub pay. I haven't had any work." Mantell told Palladino that he was second on the out-of-work list. Palladino "began to ridicule me about my Brother Frankie." Mantell told Palladino, "I'm Ron Mantell, Not Frank Mantell. I'm coming here to ask you for a job." According to Mantell, Palladino said "that no contractors have been calling for me" and that "I was allowed to find my own work." Palladino said that "[i]t wasn't his job to find me a job because no contractors

were calling." Mantell testified that Palladino said that "he knew that I was planning on calling the National Labor Relations Board and if I did that he would bring me up on charges."[11]

Mantell testified that Matthew Chavi, at that time an employee and member of the Local Union, was present but did not participate in the conversation. Chavi testified and described the conversation between Mantell and Palladino. Initially his account of the conversation was consistent with but fuller than Mantell's account. He testified that Mantell "came back and said that he needed to go to work and wanted to know if Dick would send him out to work, that he needed to go to work." Palladino told him that there were "lots of guys wanting to go to work at the time" and that "if something come up, he'd see what he could do." Chavi also testified that Palladino told Mantell that "he has the option of going out and finding his own work . . . his old contacts or callbacks or if he could find someone if he needed to go to work . . . . But he said he'd see if he could do something." Chavi described Mantell as "getting a little hot" as the conversation turned to Mantell's belief that Palladino was not providing him work because of his family. Chavi testified that Mantell brought up his family—"which is his uncle and his father and his brother, Frank"—and complained that the family members' "stock had gone down and that he thought Dick wasn't putting him out to work." Although the product of leading questioning ("And did you hear Ron threaten Dick about going to the NLRB"), Chavi testified that Mantell raised the issue of the NLRB, stating that Mantell said that "If Dick wasn't going to send him to work, he was going to the NLRB." According to Chavi, Palladino told Mantell "go ahead and do what you have to do." Chavi said nothing in his testimony about Palladino saying anything about bringing Mantell up on charges.

Palladino testified briefly. He was asked, in leading fashion: "did you threaten Ron Mantell that if he went and filed charges with the board that you would file internal Union charges against him?" Palladino answered "no" to this question.

In terms of demeanor, both Mantell and Chavi testified with credible demeanor. Chavi's account is plausible and in many ways fuller than Mantell's. This conversation occurred approximately a month after the administrative law judge had ruled against the Local in Frank Mantell's unfair labor practice case—something both Mantell and Palladino would have been attuned to—so it does not surprise me that the NLRB was mentioned in this conversation. Regardless of whether Mantell (his account) or Palladino (Chavi's account) first raised the NLRB, the critical question is whether Palladino made a reference to bringing charges against Mantell if an NLRB unfair labor practice charge was filed. Mantell's account of this was credible in demeanor. Chavi did not specifically address it. His account of what Palladino said in response to his claim that Mantell raised the possibility of going to the NLRB did not include the threat, but Chavi's answer was short and offered tenuously ("If I remember correctly, Dick looked at him and said go ahead and do what you have to do"). Chavi did not affirmatively deny that the threat of retaliatory charges was made. Palladino did deny it, as noted. But his one-word denial of a fully leading and conclusory question was not convincing. Indeed, in his testimony, Palladino did not even offer an account of the conversation, but simply answered a single leading and conclusory

[11]Mantell testified that he called an International Union official in Washington D.C. to tell him about the conversation he had with Palladino. Mantell testified that a few days after their conversation, Sabatoni called Mantell back and told Mantell that he had talked to Palladino, and that Palladino "said he hasn't been able to place me on a job" and that "his advice to me is that I can go and find my own work." I credit that Mantell was told this by Sabatoni, but the contention that Palladino said it is hearsay. Sabatoni did not testify and he has not been shown to be an agent of the Respondent Local Union. In any event, the testimony about the conversation with Sabatoni neither corroborates nor undercuts the alleged threat by Palladino.

question about whether he threatened Mantell. My view is that more likely than not, Palladino told Mantell that if he (Mantell) filed an NLRB charge, that Palladino would bring him up on internal union charges. I find that, as Mantell testified, Palladino told Mantell that.[12]

Analysis

The threat that I have found that Palladino made to Mantell is obviously unlawful. *Teamsters Local 391 (UPS)*, 357 NLRB 2330, 2330–2331 (2012). It would have a reasonable tendency to "impair[ ] access to the Board's processes." *Office of Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1418–1419 (2001).[13]

C. The Internal Union Charges Brought Against Mantell

In March 2017, Palladino charged Mantell with violating the Union-Building Industry Employer's Association labor agreement and the Union's constitution by working in February 2017 for a signatory-contractor (Scrufari) on a job where no union steward had been hired or appointed.

The Local Union's agreements provide that a union steward must be on every job worked by an employee working under the labor agreement, and the Union's constitution requires that members' comply with such rules. Palladino testified credibly that first year apprentices go through a "Steward Preparedness" class to learn about the importance to the union that there be a steward for each job so that the Union can protect working standards.

The Local learned about Mantell's work for Scrufari when Mantell brought his check stub into the Local's benefits office seeking credit for the work. The Union had been unaware of this work and believed that a steward should have been on this job. Mantell argued that the caulking work he was involved with was not covered by the agreement. Palladino filed internal union charges against Mantell soon thereafter. After a trial conducted April 8, 2017, Mantell was found guilty as charged by the Union's executive board. The board assessed a fine of $500 and suspended Mantell from union membership for six months. Local Union President William Grace testified that the $500 fine amounted to approximately two days' pay, and that the six-month suspension of membership in good standing only prevented Mantell from attending union meetings but did not impair his ability to work. There is no evidence countering this explanation of the penalties offered by the local union president. The penalties were held in abeyance pending the resolution of Mantell's appeal to the International Union, which was pending at the time of the unfair labor practice hearing.

[12]I note that given my analysis, it is not necessary to consider former Local Business Manager Robert Connolly's testimony that in the spring of 2017—approximately six months after the incident between Palladino and Mantell—Palladino announced at a Local membership meeting that, essentially, there would be retaliation against anyone who filed an NLRB charge against the Local Union. This statement was not alleged by the General Counsel to be an unfair labor practice. In reaching my conclusion in the text regarding the statement by Palladino to Mantell in November 2016, I have assumed without deciding that the Spring 2017 statement testified to by Connolly did not happen.

[13]In addition to alleging that this threat violated Sec. 8(b)(1)(A) of the Act, the complaint alleges that Palladino's threat was motivated by Mantell's brother's protected activity. I do not reach that allegation. Findings as to the motivation for this threat would not materially affect the remedy or, indeed, the violation found.

Analysis

The complaint alleges that the internal union charges and the suspension of membership were motivated by retaliation for Mantell's brother's protected and concerted activity, and therefore violative of Section 8(b)(1)(A) of the Act.

The General Counsel's brief focuses on marshaling evidence to prove the discriminatory motivation for the internal union discipline. However, a threshold problem with the General Counsel's allegations is that the internal union discipline meted out against Mantell does not fall within the ambit of union conduct regulated by Section 8(b)(1)(A).

While Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7" (29 U.S.C. § 158(b)(1)), the Supreme Court has rejected a "literal reading" of Section 8(b)(1)(A) that would find that that the mere fact that a union acts in response to the exercise of a Section 7 right constitutes "restraint" or "coercion" within the meaning of Section 8(b)(1)(A). *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 178-179 (1967). The Act does not broadly deputize the Board to adjudicate internal disputes between labor organizations' officers and members.

As the Board as explained: "Simply put, we will not scrutinize a union's internal discipline of its members, *even for allegedly discriminatory reasons*, so long as the action does not restrict access to the Board's processes or invoke any aspect of the employment relationship." *In re Textile Processors*, 332 NLRB 1352, 1354 (2000) (emphasis added). Where, as here, the internal union discipline "was restricted to the status of a member, as a *member*, rather than as an *employee*" there is no violation of 8(b)(1)(A). *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417, 1420 (2000).

In *Sandia*, the Board overruled cases "in which the Board has found violations of Section 8(b)(1)(A) even in the absence of any meaningful correlation to the employment relationship and the policies of the Act." *Sandia*, 331 NLRB at 1419. In *Sandia*, the Board returned to its longstanding standard in which it "consistently distinguished between, on the one hand, internal union enforcement and, on the other, external enforcement, impacting the employment relationship. Indeed, the Board viewed this distinction as a central tenet of Section 8(b)(1)(A) and its proviso." *Sandia*, supra at 1420. As the Board put it, Section 8(b)(1)(A) "was not enacted to regulate the relationship between unions and their members unless there was some nexus with the employer-employee relationship and a violation of the rights and obligations of employees under the Act." *Sandia*, supra at 1424. In dismissing an 8(b)(1)(A) complaint over internal union discipline, the Board in *Sandia* stated:

> What is of critical significance in our judgment is that the only sanctions visited on the Charging Parties by the victorious intraunion faction were internal union sanctions, such as removal from union office and suspension or expulsion from union membership. The relationship between the Charging Parties and their Employer, Sandia, was wholly unaffected by the discipline. Nor are any policies specific to the National Labor Relations Act implicated by the union discipline at issue. . . . [W]e find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to

> unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act.

331 NLRB at 1418–1419.

Here, the internal union actions taken against Mantell do not affect his employment relationships, impair access to Board processes, or pertain to unacceptable methods of union coercion, such as physical violation. The General Counsel does not contend otherwise.

Rather, in an effort to will this square peg into the round hole of Section 8(b)(1)(A), the General Counsel baldly asserts that the union's internal discipline "impairs policies imbedded in the Act." But absolutely no case is cited and no argument made for this misreading of the Act's framework.

In *Sandia*, the Board cited to examples of the types of situations "when intraunion discipline clashes directly with statutory policy interests and prohibitions incorporated in the Act." 331 NLRB at 1424. These included instances where unions fined employees to compel conduct in violation of a collective-bargaining agreement (*Mine Workers Local 12419 (National Grinding Wheel Co.)*, 176 NLRB 628 (1969)), or punitively fined a member seeking access to the Board's processes to file a decertification campaign (*Molders Local 125 (Blackhawk Tanning Co.)*, 178 NLRB 208, 209 (1969)), or fined members for refusing to take action in violation of 8(b)(4)(B). *Plumbers (Hanson Plumbing)*, 277 NLRB 1231 (1985).

In this case, there is nothing remotely similar at issue. In direct contravention of *Sandia*, the General Counsel appears to presume that union discipline motivated by Section 7 activity ipso facto "impairs policies embedded in the Act" in violation of Section 8(b)(1)(A). However, this argument was explicitly rejected by the Board majority in *Sandia*, which dismissed the dissent's view that union discipline "contravenes a policy of the Act" just because the discipline punished "the Section 7 right to concertedly oppose the policies of union officials." 331 NLRB at 1424. The Board majority in *Sandia* explained that while "we reaffirm the principle that Section 7 encompasses the right of employees to concertedly oppose the policies of their union, we reject our dissenting colleague's insistence that Section 8(b)(1)(A) will proscribe virtually each and every form of intraunion discipline pertaining to virtually any form of intraunion dispute without regard to the employment context or the policies of this Act." 331 NLRB at 1425. Simply put, the Board will not find an 8(b)(1)(A) violation in every case where internal union discipline was a response to Section 7 activity. There must be an actual and not a "speculative" and "attenuated" effect on the member as an employee. *Sandia*, 331 NLRB at 1425.[14]

[14]See *Electrical Workers Local 2321 (Verizon)*, 350 NLRB 258, 262 (2007) ("While Respondent may discipline employees for circulating or supporting a decertification petition, it may not threaten to take any action to affect their employment"), quoting *Service Employees Local 399 (City of Hope)*, 333 NLRB 1399, 1401–1402 (2001) ("While Respondent may discipline employees for circulating or supporting a decertification petition, it may not threaten to take any action to affect their employment"); *Sandia*, 331 NLRB at 1424 ("union restraint and coercion of Section 7 rights is regulated under Section 8(b)(1)(A), and . . . the central them of both the Supreme Court's 8(b)(1)(A) decisions and of Board's 8(b)(1)(A) cases prior to [*Carpenters Local 22 (Graziano Construction Co.)*, 195 NLRB 1 (1972) (overruled by *Sandia*)] is that section was not enacted to regulate the relationship between unions and their members unless there was some nexus with the employer-employee relationship and a violation of the rights and obligations of employees under the Act"); *Teamsters Local No. 170 Leaseway Motor Car Transport Co.)*, 333

Here, I recognize that Frank Mantell's criticisms of the Local Union's leadership necessarily—to have even been protected by Section 7,[15]—must "bear[ ] some relation to the employees' interests as employees." *Sandia*, 331 NLRB at 1424. However, the essence of Frank Mantell's criticisms was an argument over the conduct and principles and judgment of the union leadership. It was a criticism of Palladino's alleged failure to apply union policies and an effort to "press the union to change its policies." 365 NLRB No. 28, slip op. at 2. It was not an effort to change the union's collective-bargaining posture, or its relationship with employers, or to convince the union to alter the terms and conditions of employment with employers. The only sense in which Frank Mantell's criticisms related to employment was that he criticized Palladino's granting of a journeyman's book to a local candidate, thereby increasing by one the number of individuals eligible to vie for journeyman jobs in the area. This may, as the Board found, help establish that Frank Mantell was engaged in Section 7 activity. But finding an 8(b)(1)(A) violation based on wholly internal union discipline motivated by such comments would be precisely the type of "quantum leap" based only on a "potential" and "attenuated" "speculative impact" on the employer-employee relationship that the Board has rejected. *Sandia*, 331 NLRB at 1425. In this case, the Local's discipline of Mantell, even if "for allegedly discriminatory reasons," (*In re Textile Processors*, 332 NLRB at 1354), had no effect on the union's collective-bargaining posture or the employees' employment terms and conditions. Finding a violation in these circumstances would be at odds with the Supreme Court's "essential accept[ance]" of "the Board's longstanding position . . . that Section 8(b)(1)(A) is to be narrowly construed so as not to reach internal union discipline unless such discipline affects a member's employment status." *Sandia*, supra at 1421. I dismiss this allegation.

D. The out-of-work list allegations

Mantell testified that since November 2015, he regularly—on average twice a week—would go to or call into the local union hall to check the out-of-work list maintained by the Local Union. This list was updated as frequently as daily, although if no one had been sent to work the list would not be updated or changed. Neri testified that how often the list was updated "depends on how many people sign in, how many people we send out to work. It could be updated once a week, twice a week, three times a week."

When Mantell went in personally, he would ask to see the list which was kept inside the sliding glass window behind the internal office counter. The administrative office was behind the window counter. Neri or one of the other employees would then show him the list. He regularly

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NLRB 1290 (2001) (internal union discipline including $26,000 fine and removal from office in reprisal for members' protected dissident activity in support of union presidential candidate does not interfere with his employment or contravene other policy interests arising under Act and therefore does not violate Section 8(b)(1)(A)); *In re Textile Processors*, 332 NLRB 1352 (2000) (applying *Sandia* and dismissing 8(b)(1)(A) case, even assuming union discriminatorily enforced rule in order to retaliate against employee for engaging in internal union activities, as internal union discipline "even for allegedly discriminatory reasons" does not violate Act "so long as the action does not restrict access to the Board's processes or invoke any aspect of the employment relationship").

[15]In *Laborers Local* 91, 365 NLRB No. 28, the Board reiterated that it is "'elementary'" that Section 7 protects "'an employee's right to engage in intraunion activities in opposition to the incumbent leadership of his union.'" Id. at slip op. 1, quoting *Steelworkers Local 397 (U.S. Steel Corp.)*, 240 NLRB 848, 849 (1979).

viewed the out-of-work list during this period and there were no problems encountered with him being allowed to view it.[16]

Neri confirmed that for the past three or four years, the out-of-work list has been kept inside the office on the ledge inside the glass office window. He testified that before that it had been kept on the bulletin board in the open area of the hall but people would take it and the Local employees would not even realize it was missing. So the decision was made to keep the list inside the glass window. The Local employees would show the list to anyone who came in and asked to see it. However, Neri testified that "most guys didn't even want to see it. They just ask us where am I on the list."[17]

On June 26, 2017, Mantell went to the Local Union and asked to view the out-of-work list. Neri said that the list was being updated but he showed Mantell the most recent list and pointed out two individuals who had been sent out as stewards. Each was lower on the list than Mantell. Mantell decided to go down to the job site where they had been sent to see the type of work they were performing and whether they were serving as stewards. He did this, without incident, and spoke to two laborers there with whom he had worked in the past. Based on what Mantell was told by them he believed that the two referrals were not serving as stewards.

The next day, June 27, Mantell returned to the Local Union hall to review the out-of-work list again and to obtain copies of certain contracts. According to Mantell, Neri told him that "I wasn't allowed, that Richard Palladino told him that I'm not allowed to view the out-of-work list . . . "[b]ecause of what happened yesterday." Mantell assumed that by "what happened yesterday," Neri was referring to Mantell's "policing activity by me going to the job and asking questions and stuff of that nature." Mantell protested that in 2015 he had once had to call an International Union representative in order to obtain access to the list, but Neri told Mantell that he was "just doing what he's told" and that "Richard told [him] I'm not allowed to see the list." Mantell was also denied access to the contracts. Neri told him that to see the contracts he would have to contact the Department of Labor.[18]

Mantell went home and called the International Representative he had spoken to in 2015. Sometime after that, when Mantell returned to the Local Union, later in June or in early July, the Local had begun posting the out-of-work list behind the glass office window, taping it up so it was visible to anyone standing in front of the sliding glass window. This had the advantage for Mantell (and others) that they no longer had to ask to see the list—it was posted in plain view.

[16]In his testimony Mantell made reference to a time in November 2015, when he contacted an International union representative, Chris Sabatoni, regarding a problem he was having viewing the list at the Local Union. Since that time, Mantell regularly reviewed the list without incident.

[17]Neri worked at the Local every morning and left at about 12:30 p.m. His office area was shared with a full-time secretary, identified as Diana. In addition, a secretary identified as Nancy Simms works one-day a week.

[18]Neri disputed Mantell's characterization of this conversation but admitted he only "kind of remember[ed]" the conversation. Neri said that it was a "passing conversation" and that when Mantell asked for the list Neri told him "it was the same list that you saw yesterday. And he says something to the effect, he has a right to see the list. And I said, you just saw the list. I don't know, I don't remember the whole conversation." Neri testified that he could not remember if he gave Mantell the list or not. I credit Mantell's surer, less vague, and more credibly offered account.

However, with this change the posted list was only updated weekly. Neri testified that he followed the same procedure as always in updating the list, as frequently as daily if necessary, but that since approximately June it is only posted weekly. The result is that members could not see the list as it evolved during the week, but were only able to see the revised list weekly. Neri testified that this change was one permitted by the referral rules: "In the referral rules, it says it has to be posted once a week for the members to look at it."[19] Neri explained that the change in procedure was made because "recently, there's been all this barrage of taking pictures of it, being a little abnormal from the normal practice." Neri described an uptick in requests to see the list which burdened the secretary and became "an aggravation." Posting the list ended the problem.

Mantell testified that the list being updated weekly made it less easy for him to "police" it, "as far as seeing who disappears off the list . . . now if they're updating the list once a week I can't view the list and see who comes off the list during the week."

Analysis

The General Counsel alleges that the Respondent violated Section 8(b)(1)(A) by refusing to allow Mantell to view the out-of-work list on or about June 27, 2017, and then again by changing its practice of updating the out-of-work list daily and moving to a practice of posting the out-of-work list weekly. The General Counsel alleges that both of these actions were in response to Mantell's investigation of the referral of two individuals below him on the out-of-work list.

This is a nonexclusive hiring hall, hence, as noted above, the duty of fair representation does not apply, as that duty is derived from and coextensive with the union's authority under the Act to act as the exclusive representative for the members of its collective-bargaining unit. See *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 376 n. 22 (1984). However, as with an alleged refusal to refer, it violates Section 8(b)(1)(A), even at a nonexclusive hiring hall, to refuse members access to out-of-work list as retaliation for protected activity. Just as a discriminatory refusal to refer would violate 8(b)(1)(A), a discriminatory refusal to thwart member efforts to investigate whether their referral—i.e., their right to employment—is being protected, would run afoul of Section 8(b)(1)(A).

Mantell, by his own testimony, frequently, and without incident, reviewed the out-of-work lists during 2016 and 2017. However, as found, above, on June 27, Mantell's request to view the out-of-work list was denied. This was done (according to Mantell's credited testimony of what Neri told him Palladino had said), on the order of Palladino.[20]

[19]Article 7.B. of the Local Union job referral rules states:

> Lists containing the information described in § 6(A) and (B) [i.e., "A current out-of-work list] shall be conspicuously posted, or otherwise immediately available for inspection, at the offices of Local 91 on a weekly basis, so that the previous week is posted or immediately available by the close of business on the following Monday. The information shall remain posted or immediately available for at least two weeks.

[20]There is no hearsay problem attached to this unrebutted testimony. Both Neri and Palladino's statements are non-hearsay admissions pursuant to Federal Rule of Evidence 801(d)(2). *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001). In any event, any objection to this evidence would be waived at this point. Id.

In confronting Mantell, Neri attributed it to "what happened yesterday." Mantell "assumed" that this was a reference to his policing activities when, after viewing the list on June 26, he went down to a worksite to investigate whether the two employees referred out were acting as stewards. However, as the Respondent points out, there is zero evidence that any local union official knew of Mantell's actions. Mantell described walking around the construction site without incident, agreed that he was "incognito" in a hard hat and safety glasses, and he talked only to two co-employees he had worked with in the past.

But if there is no direct evidence of a local union official seeing Mantell at the workplace, or learning of Mantell being there, to what was Neri referring when he told Mantell on June 27 that he could not view the out-of-work list because of "what happened yesterday?" The Respondent's witnesses supplied no answer at all. Neri, who could not remember "the whole conversation," and could not remember if he showed the list to Mantell, did recall that he told Mantell that "it was the same list that you saw yesterday." Palladino did not address the matter in his short testimony. He did not deny having told Neri not to show Mantell the out-of-work list to Mantell. Particularly in the absence of any other explanation, the comment and its timing are very suspect.

As referenced above, the Board has long recognized that in discrimination cases unexplained timing can be indicative of animus. *Electronic Data Systems*, 305 NLRB at 220; *North Carolina Prisoner Legal Services*, 351 NLRB at 468 (2007). Moreover, an inference of a respondent's knowledge of protected activity may be drawn in appropriate circumstances based on the timing of the respondent's actions. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253–1254 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996); *La Gloria Oil & Gas Co.* 337 NLRB 1120, 1123 (2002) ("the timing of the discharge in relation to [the supervisor] learning of the activity supports a finding that [the supervisor] knew of the activity and knew who had been involved"); see also *Metro Networks, Inc.*, 336 NLRB 63 (2001) (Board can infer knowledge from the timing of the discharge); *Medtech Security, Inc.*, 329 NLRB 926, 929–930 (1999).

Here, by all evidence, Mantell had been routinely and frequently phoning and coming into the Local Union to view the out-of-work list for at least a year and a half. As far as the record shows, this occurred without incident. While this might be said to temper the gravity of the violation—at the same time, it adds to the probative weight of the timing of the Union's sudden refusal to allow Mantell to view the out-of-work list on June 27, based on something "that happened yesterday." Only after—the day after—Mantell took affirmative steps to investigate the job referrals by heading down to a job site to scrutinize the employment situation, the Local Union denied him access to the out-of-work list based on something that "happened yesterday." As Mantell assumed, his trek down to the workplace to police the referrals is the more than likely explanation. The Respondent would argue that it was a coincidence, but I find that unlikely and unbelievable.

In terms of *Wright-Line*, I believe that a violation has been proven. Mantell's investigation into compliance with referral rules (and contract terms) is classic protected activity. As I have found, the timing of the sudden denial of Mantell's request to review the out-of-work list raises an inference that the Respondent knew of Mantell's policing of the referral system, and suggests animus as the motive for the denial of his request. Neither the evidence generally, nor the Respondent specifically, offers any alternative explanation for the denial, much less one establishing that the Respondent would have denied Mantell access to the out-of-work list on June 27, in the absence of his protected activity. I find the violation as alleged.

The General Counsel also alleges that the Local Union's change in posting frequency of the out-of-work list, beginning some time in late June or early July, was motivated by Mantell's policing activity on June 26, and on that basis also violated Section 8(b)(1)(A) of the Act. In short, the General Counsel allege that the Respondent's move to post the out-of-work list on a weekly basis—instead of members having to ask at the desk to see it, but being able to see updates daily—violated the Act. I do not agree.

First, while the timing of the change to weekly posting came after Mantell's June 26 policing activity, unlike the June 27 incident denying Mantell the out-of-work list, the change in posting policy is otherwise credibly explained by the Respondent. Neri explained that the change was made because of an uptick in members viewing and photographing the list. Having them have to involve a union secretary or Neri every time someone wanted to see the list was disruptive and "an aggravation." So the Union began posting the updated list weekly and members could view, take notes, or photograph the list without requiring a union secretary to stop what he or she was doing and provide them the list. This is plausible, and, in my view, a credible explanation. And, of course, it benefitted members because with the list posted they did not have to have assistance (i.e., consent) of the Local Union to view the list—so the change was not entirely adverse. The "adverse" part of the change was that members could now see the changes in the list only weekly. The nexus between Mantell's June 26 policing of the out-of-work list and this reasonable policy change is quite thin. Notably, this change did not apply just to Mantell. Indeed, even assuming, arguendo, that the General Counsel has met his initial *Wright Line* burden to show that the Respondent was motivated to make this change in overall policy based on Mantell's protected activities, I find that with Neri's explanation the Respondent has demonstrated that it would have made the change even absent Mantell's going to down to the construction site to police the referral list on June 26.

I note that it is to be remembered that the General Counsel is not alleging that the Union's change in posting policy was a breach of the duty of fair representation. He is also not alleging that the change in policy was discriminatorily motivated by Mantell or other employees' repeated requests to view the out-of-work list. Nor could the General Counsel successfully maintain such claims. Particularly in a nonexclusive hiring hall, where the duty-of-fair representation does not apply,[21] but even in an exclusive hiring hall, there is no general "right" of members to view the out-of-work list at any time, without regard to the Union's legitimate concerns and rationales. The Local Union's effort to avoid the disruption to staff of many requests to see the out-of-work list by posting a weekly list is a good-faith, non-arbitrary, non-discriminatory basis for its actions. See *Operating Engineers Local 181 (Maxim Crane Works)*, 365 NLRB No. 6, slip op. at 5 & fn. 5 (2017) (in exclusive hiring hall, duty of fair representation is violated only when access to out-of-work list denied on arbitrary, discriminatory, bad-faith basis). In any event, the General Counsel does not allege a breach of the duty of fair representation or that the Union's change in policy was motivated by Mantell or employees' over-requesting of the out-of-work list. I will recommend dismissal of this allegation.

[21] *Carpenters Local Union 370 (Eastern Contractors Ass'n)*, 332 NLRB 174, 174–175 (2000).

CONCLUSIONS OF LAW

1. The Respondent Laborers' International Union of North America, Local Union No. 91 is a labor union within the meaning of Section 2(5) of the Act.

2. The Respondent violated Section 8(b)(1)(A) of the Act, in or about early November 2016, by threatening Charging Party Ronald Mantell with internal union charges if contacted the National Labor Relations Board.

3. The Respondent violated Section 8(b)(1)(A) of the Act, on or about June 27, 2017, by refusing to show Charging Party Ronald Mantell the Local's out-of-work list in retaliation for his protected and concerted activity.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully refused to show Ronald Mantell the out-of-work list on June 27, 2017, must grant Ronald Mantell's request to examine the out-of-work referral list. If a version of the out-of-work list as it existed on June 27, 2017, when Mantell was denied his request to see the list, is saved or retrievable, the Respondent must permit him to examine the list as it existed on June 27, 2017.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Respondent's offices or wherever the notices to members are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 3 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

[22]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Laborers' International Union of North America, Local Union No. 91, Niagara Falls, New York, its officers, agents, and representatives, shall

1. Cease and desist from:

   (a) Threatening Ronald Mantell or any employee with reprisals if he or she contacts the National Labor Relations Board.

   (b) Refusing requests of Ronald Mantell or any members to examine the out-of-work referral list in retaliation for protected and concerted activity.

   (c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

   (a) Grant Ronald Mantell's request to examine the out-of-work referral list. If a version of the out-of-work list as it existed on June 27, 2017, when Mantell was denied in his request to see the list, is saved or retrievable, permit him to examine the list as it existed on June 27, 2017.

   (b) Within 14 days after service by the Region, post at its Niagara Falls, New York facility copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

   (c) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 11, 2017

David I. Goldman
U.S. Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with reprisals for contacting the National Labor Relations Board.

WE WILL NOT refuse to show you the out-of-work list in retaliation for your protected and concerted activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights listed above.

WE WILL grant Ronald Mantell's request to examine the out-of-work referral list AND WE WILL, if a version of the out-of-work list as it existed on June 27, 2017, when Mantell was denied in his request to see the list, is saved or retrievable, permit him to examine the list as it existed on June 27, 2017.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 91
(Employer)

Dated _____ By _____
(Representative)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

Administrative Law Judge's decision can be found at www.nlrb.gov/case/03–CB–196682 by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (518) 419-6669.